1988

Breuer-Harrison, Inc. , Casper J. Breuer and William Harrison v. Keith P. Combe and Evelyn Combe : Brief of Respondent

Utah Court of Appeals

Prince, Yeates & Geldzahler; John P. Ashton and Erick Strindberg; Jack L. Schoenhals; David E. West; Armstrong, Rawlings .
Hanson, Epperson & Smith; Theodore E. Kanell; Attorney for Respondent.

880353-CA

IN THE UTAH COURT OF APPEALS

BREUER-HARRISON, INC., CASPER J. BREUER and WILLIAM HARRISON, Plaintiffs & Respondents, vs. KEITH P. COMBE and EVELYN COMBE, Defendants and Appellants, and ATTORNEY'S TITLE GUARANTY FUND, INC., and ROBERT E. FROERER, Defendants & Respondents.	Case No.: 880353-CA

BRIEF OF RESPONDENT ROBERT E. FROERER

Appeal from the Second Judicial District Court
Weber County, State of Utah
Honorable Ronald O. Hyde, Judge

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LIST OF PARTIES

All the following were parties to the proceeding below:

Breuer-Harrison, Inc.
Casper J. Breuer and
William Harrison

Plaintiffs & Respondents

Represented by:
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36 South State Street

Keith P. Combe and Evelyn Combe

Defendants and Appellants

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STATEMENT OF JURISDICTION

Respondent, Robert E. Froerer, adopts the statement of jurisdiction submitted by Respondent, Attorney's Title Guaranty Fund Inc.

STATEMENT OF THE ISSUES

Respondent, Robert E. Froerer (Froerer), is involved in only part of the issues that are presented on appeal. The issues relating to Froerer were resolved by summary judgment. The issues on appeal relating to Froerer are as follows:

1. The Respondent, Froerer, adopts the statement of issues set forth in Respondent, Attorney's Title Guaranty Fund, Inc.'s Brief numbered one through four.

2. In addition to those issues related above, this Court must determine whether or not the District Court was correct in ruling that Combes had no cross-claim against Robert E. Froerer for malpractice, either as a title abstractor or as an attorney.

DETERMINATIVE STATUTES

There are no determinative constitutional provisions. Respondent relies on the following statutes: 78-12-25, Utah Code Annotated, 1953 (as amended).

Within four years:

> (1) an action upon a contract, obligation or liability not founded upon an instrument in writing; also on an open account for goods,

wares, and merchandise, and for any article charged in a store account; also on an open account for work, labor or services rendered, or materials furnished; provided, that action in all of the foregoing cases may be commenced at any time within four years after the last charge is made or the last payment is received.
(2) an action for relief not otherwise provided for by law

STATEMENT OF CASE AND FACTS

On August 4, 1986, cross-defendants, Keith and Evelyn Combe filed cross-claims against the defendant, Robert E. Froerer, claiming in their first cause of action negligence as an attorney and alleging in their second cause of action some claim for either breach of contract or tort liability. The allegedly negligence acts occurred, if they occurred at all, in 1979. All of the issues between Appellants and Froerer were decided by summary judgment. (R.912). The material undisputed facts considered by the Court at the time of the motions for summary judgment were taken from the pleadings and from the deposition testimony of Keith B. Combe, Robert E. Froerer, and Steve Keil.

The statement of facts set forth in Appellants' brief are not particularly relevant to Robert Froerer as it for the most part contains facts brought out at trial. Froerer did not participate in the trial, as the trial concerned issues and claims between Combes and the Plaintiff/Respondent, Breuer-Harrison, Inc. Respondent Froerer would therefore request that

this Court consider only the facts that were before the trial court at the time the summary judgment was rendered. The material undisputed facts are as follows:

1. Keith and Evelyn Combe were the owners of real property located in Weber County, State of Utah, which they had received from the parents of Keith B. Combe in 1962. (R.1411, Combe Depo., Exhibit 1)

2. The property was subject to an easement established by the District Court pursuant to a complaint filed by the Weber Basin Water Conservatory District for condemnation. The lawsuit was tried and judgment entered on May 23, 1960. The court awarded damages to the Combes for the value of the property. Weber Basin Water Conservancy District placed a pipeline through the property pursuant to their easement. (R.797, Ex. A).

3. Robert E. Froerer is an attorney at law practicing in Ogden, Utah. He is also licensed by the State of Utah to write policies of title insurance (Froerer, deposition P.3, 16)[1]

4. Sometime in 1979, Froerer was contacted by Steve Keil, a real estate salesman, and asked to do certain legal work in connection with a real estate transaction involving property in Ogden, Utah, wherein Keith B. Combe and other members of his

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[1] The Froerer deposition is included at the Record at page 1418. The Keil deposition is included in the Record at page 1419.

family were sellers and Casper J. Breuer and William M. Harrison (and Steve Keil) were buyers. (Froerer deposition p. 6, Keil deposition pp.22, 24-25).

5. Froerer prepared a contract in connection with the real estate transaction and also prepared other documents and revisions for the sale. One of the documents was a real estate contact between sellers and buyers which was dated December 29, 1979, and signed by all the parties. (There were some later amendments to the agreement that are not material.) (Froerer, deposition pp. 6, 7, 35, exhibits 19-25).

6. In connection with the documents prepared, Froerer always considered his client to be Steve Keil, one of the ultimate purchasers. (Froerer deposition pp. 5, 6, 38, 39, 43.) Combe was not even sure who Froerer represented. (Combe deposition p. 30). Combes had all documents reviewed by their personal attorney, Paul Kunz (Keil deposition p. 25). Froerer was paid out of the proceeds of the sale sometime after the closing. The closing occurred on December 29, 1979. (Froerer deposition pp. 8, 35).

7. After the sale had closed on December 29, 1979, (which by the way occurred outside the presence of Froerer and without his actual knowledge) Froerer agreed to provide title insurance on the transaction. No preliminary title report had

been requested by the buyers or sellers. (Froerer deposition p.52). No preliminary title report had ever been issued or relied upon by any party. In fact, no preliminary title report was ever in existence.

8. Combes acknowledged that no preliminary title report had been issued and in fact did not even know that Froerer was going to issue a policy of title insurance until after the transaction was closed. (Combe deposition p.139).

9. A policy of title insurance was eventually issued by Froerer at the request of buyers on November 14, 1980, more than ten months after the sale. The underwriter on the policy issued by Froerer was ATGF. The policy of title insurance is attached as addendum one to ATGF's Respondent's brief.

10. The policy of title insurance did not make an exception for the aqueduct easement granted to Weber Basin Water Conservatory District. See, addendum to ATGF's Respondent's brief.

11. At some later date, the aqueduct easement was discovered by buyers Breuer-Harrison and an action was commenced by them to rescind the real estate contract. (Plaintiffs' Complaint R-1).

12. On May 6, 1986, the court found as a matter of law on summary judgment that the buyers were entitled to have the

contract rescinded because the aqueduct easement constituted a substantial encumbrance upon the fee title; that the sellers could not perform their contract of delivering an unencumbered title to the buyers; and buyers were not required to accept the defective title. (R. 509, 521).

13. In this action, sellers Keith B. Combe and Evelyn Combe filed cross-claims against Froerer and ATGF in August, 1986, (R. 563), to seek damages against Froerer based upon his negligence for breach of duty as an attorney (first cause of action): and to seek damages against both Froerer and ATGF based upon the issuance of a policy of title insurance (second cause of action).

SUMMARY OF ARGUMENT

Froerer's argument on appeal may be summarized as follows:

1. Froerer adopts the argument submitted by ATGF numbers 1 through 7 on pages 7 and 8 of their Respondent's brief.

2. Robert E. Froerer was not the attorney representing the sellers in the transaction, but was representing the buyers and as such had no duty to protect the interests of the sellers.

3. The Combes had their own personal attorney, Paul Kunz, review, modify and approve all documents prepared by Steve Keil's (Buyers) attorney.

4. Froerer alleged negligence caused no damage to Combe.

5. Combes' claims are barred by the statute of limitations.

ARGUMENT

INTRODUCTION

The Respondent, Froerer, had two cross-claims filed against him by Appellant Combes in their amended cross-claim on the 4th of August, 1986 (R.563). The first cause of action was a claim for attorney's negligence. Although, the Combes had previously filed a cross-claim against Froerer this amended cross-claim was the first time the cause of action for attorney negligence was asserted against Respondent Froerer. This date was more than six and half years after the alleged negligence could have occurred.

The second cause of action (although it is difficult to determine what type of claim is submitted) is against Froerer and Attorney's Title Guaranty Fund allegedly under the contract of insurance that was issued almost a year after the sale of the property. The Respondent Froerer herein adopts the argument and legal reasoning set forth by Respondent Attorney's Title Guaranty Fund in Points one through four of their Brief. See, Attorney's Title Guaranty Fund, Inc.'s Respondent's brief pp. 8-24. The

points and authorities set forth below will specifically deal with Appellant's first cause of action in their amended cross-claim.

STANDARD OF REVIEW

The cross-claim of Combes against Froerer were disposed of by summary judgment. This Court must therefore analyze the facts and inferences in the light most favorable to the losing party. Atlas Corp. v. Cloverus National Bank, 737 P.2d 225, 229 (Utah, 1987). The court below determined that based upon the material undisputed facts Combes had no claim against cross-defendant Froerer as a matter of law. Utah Rules of Civil Procedure 56(c). In order for the Combes to overcome the undisputed facts, they had to submit evidence that would have created a genuine issue of fact. If reasonable minds could not differ on the facts as presented, then the Court could rule as a matter of law that the Combes had no claim against Froerer for attorney negligence. Singleton v. Alexander, 431 P.2d 126 (Utah, 1967), FMA Acceptance Co. v. Leatherby Insurance Co., 594 P.2d 1332 (Utah, 1979).

There were several reasons asserted by Froerer in the court below as to why Combes' claim was invalid. If this Court can sustain the verdict on any reasoning, the summary judgment

should stand. Milliner v. Elmer Fox & Co., 529 P.2d 806 (Utah, 1974).

In this particular case in order for Combes to sustain their claim for negligence against Froerer they must show all of the following:

1. That Combe retained Froerer as his attorney to represent his interests in the real estate transaction, and that Froerer accepted the retention.

2. That Froerer breached his duty to Combe by failing to perform his duty to the standard of care as required by Utah law.

3. That Combe suffered some damage that was proximately caused by the actions of Froerer.

4. That Combes' claim was filed within the applicable limitation time period as established by Utah law.

POINT I

FROERER WAS NOT COMBES' ATTORNEY AND THEREFORE HAD NO DUTY TO PROTECT THEIR INTERESTS

The attorney/client relationship is one created by contract. To establish a contract, there must be evidence of an offer or a request for legal services or advise by a client and an acceptance by the attorney. A meeting of the minds must occur that establishes the rights and duties of the parties to the

contract. The terms must be concise enough for a court of law to interpret and enforce. Connelly v. Wolf, Block, Shorr, & Solis-Cohen, 463 F.Supp. 914 at Page 919 (E.d. Pa. 1978) [2]

In this particular case, Froerer believed himself to be representing the buyers and therefore should be specifically looking out for their interests. If Combe thought otherwise, he should have put Froerer on notice of his intentions.

Although, Combes' attorney states repeatedly that Combe hired Froerer and that Froerer was Combe's attorney, there are no facts in the record to support this conclusion. The record clearly shows that Steve Keil contacted Froerer and requested him to prepare documents. (R.1419, Keil Depo. pp. 22, 24-25). The record contains no evidence that Combe went to Froerer's office and requested his services prior to the closing of December 29, 1979. The record also clearly showed that before Combe would agree to sign any documents, they took them to their

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[2] Establishing the attorney/client relationship for legal malpractice action differs from establishing attorney/client relationship for conflict of interest cases. In a legal malpractice action, a client must show more than a mere divulgence of information to establish the attorney/client relationship. In a conflict of interest case even though an attorney/client relationship may never have been established, an attorney may be precluded from representing another client against the original party who divulged information. This is because of the high standard placed upon attorneys under the Code of Professional Responsibility for Fairness. Margulies v. Upchurch, 696 P.2d 1195 (Utah, 1985).

personal attorney, Paul Kunz, who reviewed the documents, modified the documents and approved the documents. (R.1419, Keil Depo. p. 25).

Combe on one occasion stated that he did not even know who Froerer represented. (R. 1411, Combe deposition, p. 30). Combe never denied that his attorney Paul Kunz reviewed the documents, made modifications, and then approved the documents. The court therefore ruled as a matter of law that Froerer owed no duty to Combe. Combes had the burden to establish that Froerer was their attorney. Combes failed to do this by any competent evidence.

The mere fact that Froerer was paid out of the proceeds of the sale does not establish attorney/client relationship. In this particular case and as in most real estate transactions, costs were paid out of the proceeds of a sale. One could argue that the proceeds for sale were actually paid by the Buyers since they were the ones who deposited the money for closing. It is interesting to note that the costs were not paid until after the purchasers and sellers had obligated themselves under the contract.

Combe would have this Court believe that since Froerer prepared some documents that he owed a legal duty to Combes. That is simply not the fact. Our adversarial system requires

that an attorney prepare documents that will protect his client. An attorney is not obligated to prepare documents that are to protect the opposing parties rights to the detriment of his own client.

Combe had the duty to present evidence to the Court that would raise a material issue of fact concerning his employment of Froerer. Other than his attorney's conclusory statements that Combe hired Froerer no actual evidence was presented which would show a meeting of the minds between Combe and Froerer. Therefore, Combe failed to create even a question of fact upon which reasonable minds could differ and the Court was correct in dismissing his claim for attorney's malpractice.

POINT II

IF WE ASSUME THAT COMBE IS CORRECT IN STATING THAT FROERER WAS REPRESENTING BOTH CLIENTS IN THE TRANSACTION THEN COMBES' CLAIM FOR ATTORNEY MALPRACTICE FAILS AS FROERER BREACHED NO DUTY TO COMBE

Combes admit that Froerer was representing Steve Keil, the real estate agent who was the developers agent and who was or would shortly become the developers partner. (See, Combes' Brief at P. 32). Combe then further states that Froerer understood that he had been hired by the Combes to perform all work necessary to complete the transaction. This is not a correct reading of the deposition. Froerer only knew that he was hired by Steve Keil to complete the work for the transaction. If we

assume that Combe did in fact hire Froerer under specific terms and obligations, then we must also assume that Combe knew that Froerer was representing both parties in the transaction.

Froerer agrees with Combes' legal statement that "It is almost impossible for an attorney to adequately protect the interest of both the buyer and the seller in a real estate transaction." Beal v. Mars Larsen Ranch Corporation, Inc., 586 P.2d 1378 (Idaho, 1978). If Froerer was to represent both parties, whom would he owe the duty to? Which party should he protect? A similar question was raised in the case of Smoot v. Lund, 13 Utah 2.d 168, 369 P.2d 933 (1962). In that case, Richard Smoot brought an action against an attorney, Howard Lund. He alleged that Lund was his attorney and owed him the duty of protection by preparing documents that would have protected him in the transaction. Smoot alleged that Lund should have included provisions in the contract that would have protected his interest over those of Lunds. The court stated at P. 936:

> In a situation such as that found here, where the attorney had represented a client, but entered into negotiations with him in which it was clearly apparent to the later that the attorney was dealing in his own interests, it is neither reasonable nor practical to suppose that the attorney will represent the client's interest to the entire exclusion of his own. Nor does the law require it. The plaintiffs appear to be intelligent, business people and they were dealing in a very substantial business transaction. There is

> nothing mysterious or inscrutable about this contract. They were able to read and understand it and they do not claim to the contrary; nor do they allege any concealment of deception as to its contents.

In this particular case, Combes were experienced in real estate transactions. He ran his own business and performed many of his own legal services. It would be unrealistic for Combe to feel that Froerer would represent Combes' interest over and above Froerer's client, Steve Keil in the preparation of the documents of this case. Especially when Combe had his attorney, Paul Kunz, review and modify the documents before he would sign them. Combes presented no evidence to show that he made such specific requests to Froerer nor did he present any evidence to show that Froerer was aware that Froerer was suppose to be protecting Combes' interest. In fact, viewing the evidence in light most favorable to Combe, the evidence could show that Froerer was nothing more than a scrivener putting together a contract under the terms that were given to him by his client, Steve Keil. Froerer, therefore, had no duty to verify the facts, question the terms of the contract, or form an opinion as to the fairness of such terms. Milliner v. Elmer Fox & Co., 529 P.2d 806, 808 (Utah, 1974).

POINT III

FROERER'S ALLEGED NEGLIGENCE CAUSED NO DAMAGE TO COMBE AND THEREFORE NO CLAIM FOR NEGLIGENCE CAN BE MAINTAINED

The facts are uncontroverted that Combes were owners of the property since 1962. They had received it from Phillip C.

Combe and Verla M. Combe, the parents of Keith B. Combe. (See, R 1416, Exhibits 1 to Keith Combe's depo.) The Combes had owned the property up to the time of the transaction in December, 1979. The Combes had tried to sell the property on several occasions and in fact had sold it at least one time before. (See, R.1416, Exhibit 6 to Combe's depo.)

A final judgment of condemnation had been entered by the Honorable Charles G. Cowley on the 23rd day of May, 1960, and was duly recorded in book 648, page 353, at the Clerk's office. (See, R.1416, Exhibit 32 to Combe's depo.). The physical characteristics of the property were the same before the transaction as it was when the court ordered recision of the contract and the property was returned to the Combes. The facts are uncontroverted that no action of the defendant Froerer, no action of the defendant Attorney's Title Guaranty Fund, and no action of the plaintiff Breuer-Harrison caused the easement to come upon the property in question. In fact, the easement had always been in existence throughout the whole time the Combes owned and attempted to sell the property. In other words, the Combes received back exactly what they had before the transaction was entered into.

It is a well settled principal of law that if a party suffers no damages as a result of negligent actions of an

attorney no claim of malpractice can be maintained. Dunn v. McKay, Burton, McMurray and Thurman, 584 P.2d 894 at 896 (Utah, 1978), Smoot v. Lund, 369 P.2d 933 at 936 (Utah, 1962).

Combe argues that because he cannot sell the property for what he sold it to plaintiff, Breuer-Harrison, that he is damaged by the difference in value. Combe fails to recognize that the reason the contract was rescinded by Judge Hyde in the first place is that the value of the property was originally determined by buyer and seller based upon a mistake of fact, i.e. no easements or encumbrances. Combes argument for damages therefore must fail as a matter of law. Whatever the value of the property was, Combe still had the same property in its same condition and therefore cannot claim that any acts of defendant Froerer caused the property to loose value. Since no damages could be established by Combe, the trial court was correct in ruling as a matter of law that he had no claim against attorney Froerer.

POINT IV

COMBE AS OWNER OF THE PROPERTY WAS CHARGED WITH CONSTRUCTIVE NOTICE OF THE EASEMENT AND THEREFORE CANNOT COMPLAIN THAT OTHER PARTIES SHOULD HAVE INFORMED HIM AS TO THE QUANTITY AND QUALITY OF HIS PROPERTY BEFORE ALLOWING HIM TO ENTER INTO THIS TRANSACTION

Combe takes the position that all other parties and their attorneys should be insurers of his obligations. This

position is untenable. Combes were the owners of the property and were charged with knowledge of its quality and status. Crompton v. Jensen, 1 P.2d 242 (Utah, 1931), Flying Diamond Oil Corp. v. Newton Sheep Co., 109 Utah Adv. Rpt. 11 at P. 18 (Utah, 1989). Combe presented no evidence that he advised Froerer of the condition of the property or that he requested Froerer to perform a title search on the property before closing. In fact, the evidence showed that Combe completed the closing at his own instance by obtaining signatures on the documents without even telling Froerer that the transaction had closed. Since Combe had knowledge of the status of his property pursuant to Utah law and could understand the contract which he signed, he cannot now complain that it required an unencumbered title to be conveyed.

POINT V

COMBES' CLAIMS AGAINST FROERER ARE BARRED BY THE STATUTE OF LIMITATIONS

Combes allege that Froerer committed negligence in December, 1979, when Froerer allowed the transaction to close without protecting Combes interest. Combes claim is either one of negligence or one of breach of contract. Combe presented no evidence to show that there was a written contract in existence between Combe and Froerer which would have allowed a six year

statute of limitations therefore 78-12-25, Utah Code Annotated 1953 (as amended) governs. This statute requires Combes to bring their action within four years from the date of the alleged negligence. The Combes did not bring this action until August, 1986. Combes did not allege fraud or mispresentation, therefore this claim against Froerer must fail as untimely filed.

CONCLUSION

Combes' claims against attorney Froerer for negligence must be dismissed because Combe never denied that their own attorney, Paul Kunz, reviewed, modified and approved the documents in question. If there was malpractice, Combe should look to his own attorney, Paul Kunz. If Froerer was in fact representing both clients, then Froerer had no duty to protect Combe in the manner asserted in his amended cross-claim. Combe asserts that Froerer was negligent in withholding material information from them, but then failed to introduce any evidence to show that Combe even met with Froerer before the closing. No party requested that title work be completed before the closing and no party relied upon any title work that was accomplished.

Combe can show no damages as a result of any action taken by Froerer and the Combes failed to file their claim against Froerer within the applicable limitation provided by Utah Statute. The District Court was therefore correct in ruling as a

matter of law that Combe had no claim against Froerer either as an attorney or as an abstractor of title and properly entered summary judgment dismissing Combes' amended cross-claim.

This Court should do likewise as Combe can present no legal basis nor facts upon which he can sustain a cause of action.

RESPECTFULLY SUBMITTED this 10th day of July, 1989.

HANSON, EPPERSON & SMITH

THEODORE E. KANELL
Attorney for Respondent
Robert Froerer

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of July, 1989, four true and correct copies of the foregoing BRIEF OF RESPONDENT FROERER was mailed, postage prepaid, to the following:

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